

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS  
HEARD BEFORE THE HONOURABLE HERMAN J. WILTON SIEGEL  
held via Arbitration Place Virtual  
on Monday, April 25, 2022 at 9:35 a.m.

REVISED TRANSCRIPT

VOLUME 1

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1 Arbitration Place Virtual

2 --- Upon commencing on Monday, April 25, 2022

3 at 9:35 a.m.

4 MR. CENTA: Good morning,  
5 Commissioner. My name is Rob Centa. I am lead  
6 commission counsel on the Red Hill Valley Parkway  
7 Inquiry which is called by the City of Hamilton.

8 I would like to open our  
9 public hearings today by acknowledging the City of  
10 Hamilton that called this inquiry is situated upon  
11 the traditional territories of the Erie, Neutral,  
12 Huron-Wendat, Haudenosaunee and Mississaugas.  
13 This land is covered by the Dish With One Spoon  
14 Wampum Belt Covenant which was an agreement  
15 between the Haudenosaunee and Anishinaabek to  
16 share and care for the resources and the Great  
17 Lakes. We further acknowledge that the land on  
18 which Hamilton sits is covered by the Between The  
19 Lakes purchase 1792 between Crown and the  
20 Mississaugas of the Credit First Nation.

21 Many of the counsel appearing  
22 at this hearing today are located in Toronto,  
23 which is on the traditional land of the  
24 Huron-Wendat, the Seneca, and most recently the  
25 Mississaugas of the Credit River. Today this

1 meeting place is still home to many indigenous  
2 people from across Turtle Island and I'm grateful  
3 to have the opportunity to work on this land.

4 First today I would like to  
5 introduce the members of the commission counsel  
6 team that will be presenting the evidence and  
7 working on this hearing. With me today, and off  
8 camera, are Andrew Lewis, Emily Lawrence, Hailey  
9 Bruckner, Shawna Leclair, Chloe Hendrie, Lauren  
10 Rainsford, and Jacqueline Cummins, our law clerk.

11 I would also like to welcome  
12 counsel for the participants in the inquiry and  
13 will ask a representative of each participant to  
14 introduce the members of their team that are  
15 present today. First for the City of Hamilton I  
16 see Eli Lederman present.

17 MR. LEDERMAN: Good morning,  
18 Mr. Commissioner. I'm getting some feedback here.  
19 I don't know if you can -- is my audio okay?

20 JUSTICE WILTON-SIEGEL: Okay.

21 MR. LEDERMAN: Okay. Thank  
22 you. So I'm assisted here today by a number of  
23 colleagues who are with me, Delna Contractor,  
24 Jonathan Chen, Jenene Roberts, Vivian Hua, Laura  
25 McIntyre, and Christina Shiels-Singh.

1 MR. CENTA: Thank you,  
2 Mr. Lederman. Another participant at the hearing  
3 is the Province of Ontario who is represented by,  
4 among others, Ms. Heather McIvor, and I invite  
5 Ms. McIvor to introduce her team.

6 MS. MCIVOR: Thank you. Good  
7 morning, Commissioner. I am here today to  
8 represent the Province and the Ministry of  
9 Transportation, and along with me is Colin  
10 Bourrier as well as Michael Sage. Thank you.

11 MR. CENTA: Third participant  
12 represented today is Golder Associates,  
13 represented by Jennifer Roberts and I think there  
14 are some other colleagues of Ms. Roberts present  
15 today.

16 MS. ROBERTS: Good morning,  
17 Commissioner. Good morning, Counsel. Yes, I'm  
18 here today representing Golder, and I am assisted  
19 by two colleagues, Nivi Ramaswamy and Fabiola  
20 Bassong. Thank you.

21 MR. CENTA: And finally  
22 Dufferin Construction, and I see Ms. Laurion --  
23 and there is Ms. McAleer representing Dufferin. I  
24 invite Ms. McAleer to introduce her colleagues.

25 MS. MCALEER: Good morning,

1 Mr. Commissioner. Good morning, Counsel.  
2 Jennifer McAleer on behalf of Dufferin and I'm  
3 with Rachel Laurion as well.

4 MR. CENTA: Because of the  
5 ongoing COVID-19 pandemic we will be conducting  
6 the public hearings via Zoom. The technological  
7 backbone for today's hearing is being provided by  
8 Arbitration Place. I wish to assure members of  
9 the public that all of the counsel for  
10 participants can see and hear the commissioner and  
11 all other counsel, all of whom are appearing  
12 remotely from each other.

13 We would ask that after we get  
14 through the introductions the counsel who are not  
15 speaking to turn off their cameras to reduce the  
16 visual distraction on the screen. So people who  
17 are watching via the live-stream may not be able  
18 to see all of the counsel who are present at one  
19 time. I expect that the Zoom process will go  
20 smoothly, but if any counsel has any problems or  
21 wishes to speak at a particular time just turn on  
22 your camera, and we've also provided you with  
23 contact information for our friends at Arbitration  
24 Place who will assist us if something goes wrong.

25 Each day of the public



1 2013 friction report related to the Red Hill  
2 Valley Parkway, and on April 24th, 2019, city  
3 council passed a resolution pursuant to  
4 section 274 of the Municipal Act 2001 requesting  
5 Chief Justice of Ontario to appoint a superior  
6 court judge to investigate matters related to the  
7 disclosure of the friction report.

8                   That resolution of city  
9 council contained the terms of reference that will  
10 guide the inquiry's work. The terms of reference  
11 require the inquiry to determine facts relating to  
12 24 questions posed by city council which fall into  
13 five general categories.

14                   First. Issues around the  
15 friction testing conducted in late 2013 on the Red  
16 Hill Valley Parkway and the Lincoln Alexander  
17 Parkway, and the subsequent report based on it,  
18 including who was involved in or received the  
19 report, why it was not provided to city council or  
20 the public, the circumstances surrounding it  
21 coming to light in 2018, the steps taken at the  
22 time, and the ramifications, if any, from the  
23 report not having been disclosed.

24                   Second. Issues around the  
25 Ministry of Transportation of Ontario friction

1 testing on the Red Hill Valley Parkway that was  
2 conducted in 2007 including whether the testing  
3 supported or rebutted the 2013 friction test  
4 results, who received those results, why the  
5 results were not provided to city council or made  
6 available to the public, and the ramifications, if  
7 any.

8 Third. Whether the City or  
9 the Ministry of Transportation conducted any other  
10 friction tests, asphalt assessments or general  
11 road safety reviews or assessments of the Red Hill  
12 Valley Parkway and whether those test results  
13 supported or rebutted the previous friction test  
14 results.

15 Fourth. What are the  
16 standards in Ontario, if any, respecting  
17 acceptable friction levels and how do the test  
18 results on the Red Hill Valley Parkway compare  
19 with those standards.

20 Fifth. To what extent do  
21 factors other than friction, including driver  
22 behaviour, lighting, and weather conditions  
23 contribute to motor vehicle accidents on the Red  
24 Hill Valley Parkway as compared to the impact of  
25 friction levels.

1                   The second part of the  
2   inquiry's mandate is to make recommendations  
3   regarding the matters I just mentioned that appear  
4   to be in the public interest, the interests of  
5   good government of the City of Hamilton, and the  
6   road safety on the Red Hill Valley Parkway.

7                   I would like to quickly review  
8   the principal activities of the inquiry since it  
9   was established and how that work will support  
10  these public hearings.

11                  On October 30th, 2019 the  
12  inquiry invited applications to participate and  
13  seek funding at the inquiry and published rules  
14  regarding such applications. We received nine  
15  applications to participate. On February 12th,  
16  2020 the Commissioner released his decision and  
17  reasons concerning participation in funding at the  
18  inquiry and he granted four entities the right to  
19  participate in the inquiry, those participants  
20  that I introduced previously: The City of  
21  Hamilton, Her Majesty the Queen in Right of  
22  Ontario, Dufferin Construction Company, a division  
23  of CRH Canada Construction Group Inc., and Golder  
24  Associates Limited.

25                  On June 25th the inquiry

1 published rules of procedure which are available  
2 on the website of the inquiry at [www.rhvpi.ca](http://www.rhvpi.ca).  
3 And these rules cover topics including the  
4 investigation phase of the inquiry, participants'  
5 obligations to preserve and produce documents to  
6 the inquiry, procedures for determining claims of  
7 legal privilege, the creation of an inquiry  
8 document database, the creation by commission  
9 counsel of documents that identify the core or  
10 background facts for use at the hearing, the  
11 process for interviewing persons that may have  
12 information that is relevant to the inquiry's  
13 work, the disclosure of proposed evidence prior to  
14 the public hearings, and rules for the conduct of  
15 these public hearings.

16 In the commissioner's decision  
17 on standing and funding, the commissioner outlined  
18 several ways that other persons who did not have  
19 participation status could nevertheless provide  
20 information to the inquiry. These methods include  
21 contacting commission counsel with information and  
22 providing written submissions at the conclusion of  
23 the public hearings. In addition, the  
24 commissioner set out that he intended to provide a  
25 forum in which individuals who had been personally

1 affected by particular accidents on the parkway  
2 could be consulted as part of the inquiry even if  
3 reconstruction of any particular accident is  
4 unlikely to fall within the terms of reference.

5 This forum was intended to  
6 provide any person who was directly or indirectly  
7 affected by accidents on the parkway with the  
8 opportunity to provide documents and to schedule  
9 individual and private discussions with the  
10 inquiry's team to provide us with a fuller  
11 appreciation of the impact of particular accidents  
12 on the residents of Hamilton.

13 The inquiry invited interested  
14 persons to advise us of their interest in  
15 contributing to the work of the inquiry through  
16 this forum, and one member of the public accepted  
17 our invitation. We had a very useful series of  
18 meetings with Belinda Marazzato and we thank her  
19 for her participation and invaluable contribution.  
20 If anyone else still wishes to participate in  
21 similar discussions they should contact me through  
22 the contact information that will be available on  
23 the inquiry website.

24 I want to speak briefly about  
25 the document collection process because that took

1 up a significant amount of the time and energy of  
2 the commission counsel and has led to some of the  
3 work that I'm going to describe subsequently.

4 Paragraph 2 of the resolution  
5 of Hamilton City Council directed the commissioner  
6 to "...obtain, bearing in mind cost and the  
7 principles of proportionality, all documents  
8 necessary to answer the 24 questions posed in the  
9 terms of reference."

10 Since the inquiry was called  
11 commission counsel have been working with the  
12 participants to identify and collect relevant  
13 documents. We have also been working with  
14 entities that, while not participants, are  
15 anticipated to have relevant documents for our  
16 work.

17 The inquiry issued summonses  
18 requiring the recipients to deliver up to the  
19 inquiry all documents covered by the summons.  
20 This process has been time consuming for, among  
21 other reasons, the COVID-19 pandemic and because  
22 of the number of years covered by the terms of  
23 reference.

24 To date commission counsel  
25 have collected over 135,000 documents. These

1 documents have been loaded into a database to  
2 permit us to share the productions with the  
3 participants. We've reviewed all the documents  
4 that we've received and have communicated with the  
5 participants and others where we've identified  
6 gaps and omissions to see if additional documents  
7 can be located.

8                   There are still a number of  
9 documents that we believe are critical to the work  
10 of the inquiry but over which the City of Hamilton  
11 has asserted a legal privilege. Later this  
12 morning the City will be bring a motion for  
13 directions to assist with the determination of  
14 whether or not the City is required to release  
15 those documents for use at the inquiry. We will  
16 return to that motion for directions later.

17                   Now I would like to discuss  
18 the overview documents which will be the first  
19 exhibits that I'll be asking you, Commissioner, to  
20 enter as exhibits at the hearing.

21                   As I mentioned earlier, the  
22 commissioner published rules of procedure for the  
23 RHVPI's investigation and public hearings.  
24 Rule 10 stated that the goal of the inquiry's  
25 investigation, in part, was to identify the core

1 or background facts that would form the basis of  
2 overview documents. Commission counsel drafted  
3 10 overview documents which in total number 1,500  
4 pages of evidence and that summarize approximately  
5 4,500 documents. The overview documents are  
6 organized primarily in chronological order.

7                                   Between February 2021 and  
8 January 2022 commission counsel provided drafts of  
9 these overview documents to counsel for the  
10 participants and invited them to review and offer  
11 comments and to suggest revisions to the overview  
12 documents. Commission counsel received and  
13 considered and revised the overview documents,  
14 where appropriate, and circulated further drafts  
15 to the participants.

16                                   I want to emphasize that the  
17 facts contained in the overview documents have not  
18 yet been tested for their truth. Commission  
19 counsel and the participants may call evidence  
20 from witnesses at the inquiry that casts doubt on  
21 the truthfulness or accuracy of the content of the  
22 documents underlying the overview documents  
23 themselves, but participants will also be free to  
24 make submissions regarding what, if any, weight  
25 should be given to any one of these documents.

1                   The commissioner will make the  
2 findings of fact in his final report after he has  
3 heard all of the evidence and received all of the  
4 submissions, and in doing so the commissioner is  
5 entitled to accept or reject some or all of the  
6 documentary and oral evidence at the inquiry.

7                   I would now like to introduce  
8 the overview documents into evidence and have them  
9 marked as the first exhibits, and I understand  
10 that this is on with the consent of the  
11 participants.

12                   Registrar, if I could ask you  
13 to please call up Overview Document number 1.  
14 Overview Document number 1 is titled  
15 "Introduction" and I ask that that be marked as  
16 the first exhibit.

17   EXHIBIT NO. 1: Overview  
18   Document 1: Introduction.

19                   MR. CENTA: Registrar, could  
20 you please call up Overview Document number 2.  
21 Overview Document 2: City of Hamilton Governance  
22 and Structure, and I ask that that be marked as  
23 the next exhibit.

24   EXHIBIT NO. 2: Overview  
25   Document 2: City of

1 Hamilton Governance and  
2 Structure.

3 MR. CENTA: Registrar, could  
4 you please call up Overview Document #3, Overview  
5 Document number 3: Construction of the RHVP. If  
6 I could ask that this be marked as Exhibit 3.

7 EXHIBIT NO. 3: Overview  
8 Document 3: Construction  
9 of the RHVP

10 MR. CENTA: Registrar, could  
11 you please call up Overview Document number 3.1.  
12 Overview Document 3.1: RHVP Design and Geometry,  
13 and I ask that we mark this as Exhibit 3.1 largely  
14 so we don't mess up the otherwise beautiful  
15 correlation between overview document number and  
16 exhibit number so early in the proceeding.

17 EXHIBIT NO. 3.1 Overview  
18 Document 3.1: RHVP Design  
19 and Geometry.

20 MR. CENTA: Registrar, could  
21 you please call up Overview Document number 4.  
22 Overview Document 4, the Ministry of  
23 Transportation of Ontario and Friction Testing.  
24 If I could ask that that be marked as Exhibit 4.

25 EXHIBIT NO. 4: Overview

1 Document 4, the Ministry  
2 of Transportation of  
3 Ontario and Friction  
4 Testing.

5 MR. CENTA: Registrar, please  
6 call up Overview Document number 5. Overview  
7 Document 5: The RHVP 2008 to 2012 and City Road  
8 Safety Initiatives 2008 to 2018. And if I could  
9 ask that that be marked as Exhibit 5.

10 EXHIBIT NO. 5: Overview  
11 Document 5: The RHVP 2008  
12 to 2012 and City Road  
13 Safety Initiatives 2008  
14 to 2018.

15 MR. CENTA: Registrar, please  
16 call up Overview Document number 6. Overview  
17 Document 6: The 2013 CIMA Report and the 2013  
18 Golder and Tradewind Reports. And if I could ask  
19 that that be marked as Exhibit 6.

20 EXHIBIT NO. 6: Overview  
21 Document 6: The 2013 CIMA  
22 Report and the 2013 Golder and  
23 Tradewind Reports.

24 MR. CENTA: Registrar, please  
25 call up Overview Document number 7. Overview

1 Document 7: The 2015 CIMA Report. If I could ask  
2 that that be marked as Exhibit 7.

3 EXHIBIT NO. 7: Overview  
4 Document 7: The 2015 CIMA  
5 Report.

6 MR. CENTA: Registrar, please  
7 call up Overview Document number 8. Overview  
8 Document 8: 2017 Pavement Evaluation and  
9 RHVP-Related Safety Initiatives, November 2017 to  
10 April 2018. If I could have that marked as  
11 Exhibit 8, please.

12 EXHIBIT NO. 8: Overview  
13 Document 8: 2017 Pavement  
14 Evaluation and RHVP-Related  
15 Safety Initiatives, November  
16 2017 to April 2018

17 MR. CENTA: Registrar, please  
18 call up Overview Document number 9. Overview  
19 Document 9: Events Leading to the Discovery and  
20 Disclosure of the Tradewind Report, if I could  
21 please have that marked as Exhibit 9.

22 EXHIBIT NO. 9: Overview  
23 Document 9: Events Leading  
24 to the Discovery and Disclosure  
25 of the Tradewind Report.

1 MR. CENTA: And finally  
2 Overview Document number 10, Registrar, if you  
3 could please call that up for me. Thank you.  
4 Overview Document 10: Disclosure of Tradewind  
5 Report to Council and Public. If I could that  
6 that be marked as Exhibit 10.

7 EXHIBIT NO. 10: Overview  
8 Document 10: Disclosure of  
9 Tradewind Report to Council  
10 and Public.

11 MR. CENTA: The overview  
12 documents and the documents referred to in the  
13 overview documents will now be made available on  
14 the RHVPI website. The overview documents are  
15 hyperlinked to the documents referenced in the  
16 footnotes so that members of the public can see  
17 the evidence that underlies those exhibits.

18 In addition to distilling the  
19 evidence contained in the 135,000 documents into  
20 the overview documents, Commission counsel have  
21 also interviewed over 100 people who we believe  
22 had information that they could share with the  
23 inquiry. The people came from many walks of life,  
24 current and former city employees, consultants  
25 retained by the City, staff at the Ministry of

1 Transportation of Ontario, and many others.

2                               We interviewed many more  
3 people than we will be calling as witnesses at the  
4 inquiry. The combination of the overview  
5 documents and the interview process allowed us to  
6 determine where it was not necessary to have  
7 persons attend to give live evidence. And we  
8 would like to thank all of the people who prepared  
9 diligently and gave us their time during the  
10 interview process, as well as their counsel for  
11 preparing them so well to assist us.

12                               So we have now arrived at the  
13 start of the public hearings. Generally, the  
14 inquiry will hold public hearings on Monday to  
15 Thursday although there will be variations in this  
16 schedule. This week, for example, we are sitting  
17 Monday through Friday. Typical hearing day will  
18 look like this: A 9:30 start, a 4:30 finish, and  
19 a lunch break from 1:00 to 2:15 p.m. There will  
20 be a 15-minute break in the morning and the  
21 afternoon, and all counsel are committed to trying  
22 to keep to that schedule even though it will prove  
23 challenging from time to time, no doubt.

24                               Again there are be variations  
25 in the daily schedule. From time to time we will

1 sit a little bit later where we think we would be  
2 able to complete an examination, for example.  
3 Today we will have a short day because of witness  
4 availability.

5 I wish to remind viewers and  
6 members of the public that a public inquiry is not  
7 a trial. Although the witnesses will be under  
8 oath, it is still not a trial. The commissioner  
9 is not asked to and is not permitted to make  
10 findings of civil liability or criminal  
11 misconduct. This is an exercise in establishing  
12 relevant facts.

13 Commission counsel will ask  
14 the bulk of the questions to witnesses as it is  
15 our role to present the evidence in a fair and  
16 comprehensive manner. Counsel for the  
17 participants will be allowed to question witnesses  
18 for a period of time to be determined by the  
19 commissioner.

20 The first witnesses to be  
21 called will provide some background information on  
22 some of the scientific issues that will inform the  
23 work of the inquiry. After that we will be  
24 calling evidence related to the design and the  
25 construction of the Red Hill Valley Parkway. We



1 will describe what is going to happen for the next  
2 two days, and then after that we will deal with  
3 the City of Hamilton's motion for directions.

4 So unless you have any  
5 questions for me, Commissioner, I will turn it  
6 over to Mr. Lewis. Thank you.

7 MR. LEWIS: Thank you,  
8 Mr. Centa.

9 Commissioner, as you know, the  
10 first two witnesses will be Dr. Gerardo Flintsch  
11 and Mr. Russell Brownlee. Both have provided  
12 expert reports. Dr. Flintsch will present  
13 tomorrow and Mr. Brownlee will do so on Wednesday.

14 Dr. Flintsch's report is  
15 titled "Primer on Friction, Friction Management  
16 and Stone Matrix Asphalt Mixtures." Dr. Flintsch  
17 is a professor of engineering at Virginia Tech in  
18 Virginia, United States of America, and is the  
19 director of the Center For Sustainable and  
20 Resilient Infrastructure at the Virginia Tech  
21 Transportation Institute.

22 Mr. Brownlee's report is  
23 titled "Principal Design and Maintenance  
24 Standards, Guidelines and General Practices For  
25 Ontario Highways." Mr. Brownlee is the CEO and a

1 principal of True North Safety Group in Toronto.

2 The purpose of their expert  
3 reports and their evidence this week is not to  
4 opine or comment on specific facts pertaining to  
5 the Red Hill Valley Parkway; rather, the purpose  
6 is to provide a base of knowledge to assist you,  
7 the participants, and the public in understanding  
8 and interpreting concepts, technical terms and  
9 evidence that may be presented subsequently.

10 Dr. Flintsch's report in part  
11 outlines the use of friction investigatory or  
12 intervention levels as part of friction management  
13 programs, primarily focusing on jurisdictions  
14 outside of Ontario and Canada. And by  
15 investigatory levels I mean stipulated measured  
16 friction numbers or values at or below which a  
17 highway agency is required to investigate whether  
18 friction on a roadway is too low.

19 By intervention levels I mean  
20 stipulated friction numbers or values at or below  
21 which actual remedial action is required. And as  
22 Mr. Centa mentioned, with respect to Ontario many  
23 individuals currently or formerly employed at the  
24 Ontario Ministry of Transportation will be called  
25 as witnesses.

1                   In addition to testifying with  
2    respect to the Ministry of Transportation's  
3    involvement in conducting friction testing on the  
4    Red Hill Valley Parkway, a number of these  
5    witnesses will testify as to MTO practice and  
6    policy respecting highway friction management in  
7    Ontario, including, but not limited, to its use of  
8    approved aggregate sources for use in surface  
9    course asphalt pavements, the standards applied in  
10   evaluating the characteristics of those  
11   aggregates, and its maintenance of a publicly  
12   available approved aggregate source list.

13                   We anticipate that individuals  
14   from the Ministry of Transportation will also  
15   explain the MTO's approach to friction measurement  
16   and its use of the ASTM locked-wheel skid tester  
17   for that purpose.

18                   In addition, the participants  
19   to the inquiry and commission counsel are  
20   supplementing Dr. Flintsch's report in evidence  
21   and the evidence of the MTO witnesses with a short  
22   document titled "Agreed Summary of Pavement  
23   Friction Practices in Canada." And could the  
24   registrar please call up that document RHV-832,  
25   "Agreed Summary of Friction Pavement Practices in

1 Canada."

2 This document has been agreed  
3 to by the participants and commission counsel as  
4 reflecting at a high level friction management  
5 practices, and in particular, the lack of  
6 published or publicly available standards setting  
7 friction investigatory levels and intervention  
8 levels in Canada. As well, this document provides  
9 some additional, but by no means comprehensive,  
10 information respecting Ontario's friction  
11 management practices.

12 The short summary of this  
13 summary document is that there are no published or  
14 publicly available national or provincial  
15 investigatory level or intervention level friction  
16 standards in Canada, and that includes Ontario.  
17 But, as I said, you will hear extensive evidence  
18 about the MTO's approach to friction management  
19 and measurement from their witnesses and there is  
20 extensive evidence around those issues in overview  
21 document 4 already introduced as an exhibit by  
22 Mr. Centa.

23 Commissioner, I would ask to  
24 make the "Agreed Summary of Pavement Friction  
25 Practices in Canada," RHV932, an exhibit, and I

1 believe that would be Exhibit 12. Sorry, 11.

2 EXHIBIT NO. 11: Agreed Summary  
3 of Pavement Friction Practices  
4 in Canada, RHV932

5 MR. LEWIS: And with that I  
6 would turn it back to Mr. Centa to I believe the  
7 last matter for the day.

8 MR. CENTA: That leaves,  
9 Commissioner, only one more thing to do today.

10 The City of Hamilton has  
11 brought a motion for directions regarding a  
12 privileged dispute. The relevant materials for  
13 use on the motion for direction has been assembled  
14 in a book of documents. Could I ask the registrar  
15 please to call up the bundle of documents labelled  
16 "City of Hamilton, Motion for Directions,  
17 Privileged Dispute Process, April 25, 2022,  
18 Materials for Use on Motion."

19 Thank you, Registrar. If I  
20 could ask that this bundle of materials, which is  
21 a Bates number that corresponds to the image  
22 numbers within the PDF, if we could mark that as  
23 Exhibit M1. And we will use that convention going  
24 forward to separate out if there are any other  
25 motions that the material filed on the motions

1 will be exhibited separately under the heading M1  
2 and so on.

3 EXHIBIT NO. M1: Documents  
4 labelled "City of Hamilton,  
5 Motion for Directions,  
6 Privileged Dispute Process,  
7 April 25, 2022, Materials for  
8 Use on Motion."

9 MR. CENTA: Registrar, please  
10 go to image 2 of Exhibit M1. The materials that  
11 we are putting before you today, Commissioner,  
12 include the City of Hamilton's notice of motion  
13 dated March 25th, 2022, a list of the withheld  
14 disputed documents, a list of the redacted  
15 disputed documents, a letter from commission  
16 counsel to counsel for the City of Hamilton dated  
17 November 22nd, 2021, that describes the process  
18 that City and commission counsel engaged in, and  
19 finally a letter from the Hamilton Spectator dated  
20 April 7, 2022.

21 I can confirm that in my  
22 discussions with counsel for the Spectator they  
23 were content to have their letter placed before  
24 you, Commissioner, but did not wish to make  
25 further oral submissions on the motion for

1 directions, that they were content to rest on  
2 their letter.

3 I understand today that  
4 counsel for the City and counsel for Golder  
5 Associates will speak to this motion, following  
6 which I will make brief submissions to you, and I  
7 invite Mr. Lederman on behalf of the City of  
8 Hamilton to speak to the motion.

9 MR. LEDERMAN: Thank you,  
10 Mr. Centa, and thank you, Commissioner.

11 This is a motion for  
12 directions which the City of Hamilton is bringing  
13 to appoint a designate pursuant to rule 15 of the  
14 rules of procedure for the public hearing to  
15 determine the claim for legal privilege with  
16 respect to 43 unique documents over which the City  
17 has maintained privilege and is the subject of a  
18 dispute as to whether or not those 43 documents  
19 are validly privileged.

20 Second, the motion for  
21 directions is to direct that the designate -- that  
22 the hearing before the designate be heard in  
23 camera, and any motion materials filed with  
24 redactions so as to protect information that may  
25 be subject to legal privilege, including

1 solicitor-client privilege and litigation  
2 privilege.

3 And thirdly, this motion is to  
4 seek an order to direct the designate to ensure  
5 that his or her decision be made public subject to  
6 any redacting -- any portions of the decision  
7 which are necessary to protect privileged  
8 information.

9 If I may, Commissioner, let me  
10 just provide a couple of points by way of  
11 background.

12 Pursuant to section 33(13) of  
13 the Public Inquiries Act any information that is  
14 protected by legal privilege is inadmissible at an  
15 inquiry. The City of Hamilton has produced over  
16 62,500 documents that were potentially relevant to  
17 the terms of reference and responsive to the  
18 summons. In addition to those documents, the City  
19 identified a number of documents which are subject  
20 to legal privilege, including documents that  
21 contain legal advice or were prepared for the  
22 dominant purpose of litigation.

23 Initially the City withheld  
24 approximately 1,000 of such documents on the basis  
25 that those documents were subject to legal

1 privilege and therefore inadmissible at the  
2 hearing stage of the inquiry pursuant to section  
3 33(13) of the Public Inquiries Act.

4 In February of 2021 commission  
5 counsel advised the City that it did not agree  
6 with the City's assertion of privilege over these  
7 documents, asserting that the City had waged  
8 privilege over all documents relevant to the  
9 inquiry.

10 The City subsequently produced  
11 unredacted copies of these documents to commission  
12 counsel on a without prejudice basis to permit  
13 commission counsel to review and identify the  
14 specific documents which commission counsel deemed  
15 relevant to the work of the inquiry and the City  
16 worked cooperatively with commission counsel to  
17 find a balanced approach that would allow  
18 commission counsel to have access to the  
19 information that was truly relevant to the terms  
20 of reference while also protecting the privileged  
21 nature of the information.

22 Following those efforts the  
23 City agreed to produce the majority of the  
24 documents which commission counsel identified,  
25 though, while maintaining the assertion of

1 privilege over 43 unique documents. It's a total  
2 of 87 when you count duplicates and partial e-mail  
3 chains, but in essence it's 43 unique documents.

4 Those are the documents that  
5 are the subject of a dispute. Commission counsel  
6 has indicated that it wishes to challenge the  
7 City's privilege assertion over those documents,  
8 and we have conferred with Mr. Centa and his team  
9 and they support this motion for directions to  
10 appoint a delegate to adjudicate this question of  
11 privilege over these documents and to have the  
12 hearing of that process held in camera.

13 I do want to address, if I  
14 could, Commissioner, just the basis for seeking  
15 the orders that we do here today, pursuant to  
16 rule 15C of the rules, provides that the  
17 commissioner may appoint a designate to exercise  
18 the powers of the commissioner in respect of the  
19 determination of claims of privilege, and indeed  
20 that practice of appointing a designate to  
21 adjudicate privilege claims has been followed by a  
22 number of other public inquiries.

23 For example, in the Elliot  
24 Lake inquiry, Justice Gage, who was a designate of  
25 the commissioner the Honourable Paul Bélanger,

1 adjudicated the privilege claim as asserted by two  
2 summons (ph) parties over a number of documents  
3 that were relevant to the inquiry. Similarly, in  
4 the Goudge inquiry, the associate chief justice of  
5 Ontario was appointed as a designate of the  
6 commissioner to adjudicate privilege claims  
7 asserted by Kingston Police Service.

8 In my respectful submission,  
9 Commissioner, appointing a designate to review  
10 privilege claims is consistent with also Justice  
11 Bellamy's recommendation in her report following  
12 the TCI inquiry that issues of solicitor client  
13 privilege be resolved by reference to, in that  
14 case, the regional senior justice of the superior  
15 court of justice or a judge designated by him.

16 Let me also, if I could,  
17 Commissioner, highlight rule 37 of the rules which  
18 empower the commissioner to direct that matters  
19 within the inquiry proceed in the absence of the  
20 public where such a direction is in the public  
21 interest.

22 The City seeks direction to  
23 have the privilege motion adjudicated in camera,  
24 as that would ensure that the privileged  
25 information contained in the 43 documents at issue

1 will remain confidential in the event that the  
2 delegate determines that the documents indeed are  
3 privileged. If a motion is not held in camera or  
4 if the motion materials are made publicly  
5 available without redactions, the parties would be  
6 prevented from referencing the privileged  
7 information in their submissions which would make  
8 the adjudication process much more challenging for  
9 the designate to adjudicate the question of  
10 privilege if the parties and counsel cannot make  
11 specific reference to the privileged information.

12 We understand that commission  
13 counsel has agreed that the motion ought to be  
14 heard in camera and that the materials ought to be  
15 made publicly available but redacted to protect  
16 the privileged information contained within these  
17 documents. We've also seen the correspondence  
18 from the Hamilton Spectator which has opposed a  
19 total in camera hearing for the motion and  
20 proposes that only those portions of the motion  
21 where the impugned documents are actually being  
22 discussed are to be held in camera.

23 While the City is certainly  
24 not opposed to that concept in principle,  
25 practically speaking we anticipate that much of

1 the parties' submissions on the privilege motion  
2 will necessarily need to focus on the content of  
3 that privileged information which could not be  
4 done or conducted in open court or in a public  
5 forum. Certainly the City would be pleased to  
6 work with commission counsel on the lead-up to the  
7 motion to assess whether there are any portions of  
8 the privilege motion that could be heard publicly,  
9 but practically speaking, there will be some  
10 challenges with doing that, given the entire  
11 nature of the motion involves the adjudication of  
12 the question of legal privilege.

13 I know that Ms. Roberts is  
14 going to speak on behalf of Golder, but I do want  
15 to make reference to the fact that the City is  
16 aware that Golder wishes to make written  
17 submissions on the privilege motion with respect  
18 to the City's claim for privilege and I just -- I  
19 would like, Commissioner, for you to know that the  
20 City is not opposed to Golder making such written  
21 submissions, but it should not, in our respectful  
22 view, receive access to the privileged documents  
23 in question which are the subject of the  
24 adjudication process which we propose to be heard  
25 by the designate.

1                   Subject to any questions,  
2 Commissioner, those are my submissions with  
3 respect to the motion for directions.

4                   JUSTICE WILTON-SIEGEL: No  
5 questions at this point, thank you.

6                   MR. CENTA: Ms. Roberts, would  
7 you wish to make submissions at this time?

8                   MS. ROBERTS: Thank you. So  
9 first of all, we take no position in relation to  
10 the relief sought in the motion for directions.  
11 And in response to the point made by Mr. Lederman  
12 that Hamilton doesn't oppose making written  
13 submissions but would oppose us seeking access to  
14 the documents, I confirm that we are not seeking  
15 access to the documents themselves but only seek  
16 the opportunity make submissions in relation to  
17 the privilege, and essentially for the purpose of  
18 expressing a view as to why it is relevant to  
19 Golder.

20                   JUSTICE WILTON-SIEGEL: Okay.

21                   MS. ROBERTS: As you know,  
22 Golder's position is the evidence we anticipate  
23 that will come out is that it delivered the  
24 Tradewind advice to the City of Hamilton, enclosed  
25 within the Golder report, and provided an

1 assessment of friction as well as recommendations  
2 in early 2014 and then subsequently provided its  
3 assessment and recommendations on a number of  
4 subsequent moments in March of 2016 and then at  
5 least on three occasions in 2018.

6 We anticipate,  
7 Mr. Commissioner, that as part of this process  
8 that you will seek to scrutinize the extent to  
9 which Golder was effective in communicating its  
10 findings and recommendations, and it is our  
11 position that in order to do so fairly that it  
12 will be important to see the full spectrum of the  
13 evidence as to what happened with the report, what  
14 happened with the advice internally within the  
15 City of Hamilton and particularly within  
16 (indiscernible), and for that reason we seek the  
17 opportunity to have our voice heard at that  
18 motion.

19 Thank you. Those are my  
20 submissions, subject to your questions.

21 JUSTICE WILTON-SIEGEL: I have  
22 no questions apart from asking Mr. Centa, do I  
23 then take it that there is no objection to the  
24 request of Golder as stated today simply to make  
25 written submissions?

1                   MR. CENTA: No, Commissioner.  
2   Commission counsel supports both the City's motion  
3   for direction and Golder's request to be able to  
4   make written submissions to the delegate. In our  
5   view it is appropriate to appoint a delegate to  
6   determine this matter. In our view it would be  
7   open to you to review the documents; however, we  
8   agree with the City that in these circumstances it  
9   is appropriate to appoint a delegate to review  
10  this collection of documents.

11                   Commission counsel is very  
12  mindful of the concerns expressed by the Hamilton  
13  Spectator and we agree that the dispute resolution  
14  process should be as open as possible, but the  
15  process in our submission cannot destroy the very  
16  privilege that the City of Hamilton is asserting.  
17  It would be -- would not be an appropriate outcome  
18  for the process to determine whether or not they  
19  have a valid claim of privilege or to destroy the  
20  subject matter of the privilege.

21                   So we encourage you in your  
22  direction as set out in the request for relief  
23  from the City to allow a process that is open as  
24  possible but that adequately protects the  
25  privilege asserted by the City of Hamilton. And



1 will be of most assistance to the delegate is a  
2 careful document-by-document fact-by-fact  
3 discussion of the privilege -- the existence of  
4 the privilege and whether it is continued to this  
5 date, and that is not a set of submissions that  
6 could readily be made in public but we will work  
7 together with the City to -- and the delegate to  
8 see what would be helpful in determining this  
9 matter.

10 And those are my submissions,  
11 unless you have any questions for me.

12 JUSTICE WILTON-SIEGEL: I  
13 don't, except to say I understand there may be  
14 some agreement with respect to the arbitrator --  
15 or the delegate.

16 MR. CENTA: If you make the  
17 decision to appoint the delegate we believe that  
18 we will be able to appoint a delegate to fulfill that  
19 task very quickly.

20 JUSTICE WILTON-SIEGEL: I have  
21 no further questions. This is a matter that I  
22 will provide directions on after the close of this  
23 session, before the opening of tomorrow's session.

24 MR. CENTA: Thank you. Unless  
25 any of the counsel for the participants have

1 anything to add that would bring to conclusion  
2 both the motion for directions and the matters  
3 that we wished to put before you today,  
4 Commissioner.

5 Unless anyone has anything to  
6 add right now we will return at 9:30 tomorrow for  
7 the first day of live evidence.

8 JUSTICE WILTON-SIEGEL: Okay.  
9 Thank you. We'll stand adjourned until 9:30  
10 tomorrow morning.

11 MR. CENTA: Thank you.

12 --- Whereupon at 10:28 a.m. the proceedings were  
13 adjourned until Tuesday, April 26, 2022  
14 at 9:30 a.m.

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